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**New Modes in Old Orders:
Crisis Government & the Written Constitution**

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“Who doubts that, in a City built for all time and without any limits to its growth, new authorities have to be established, new priesthods, modifications in the rights and privileges of the houses as well as of individual citizens?” – Livy 4.4

The Roman Dictatorship has been a mainstay of scholarship on managing crises in republics at least since Machiavelli.[°] And despite the recent contention of Ferejohn and Pasquino that contemporary circumstances are too far removed from those of Rome to warrant adherence to this ancient institution, it continues to draw attention.¹ While it is certainly true that extensive differences in contemporary institutional contexts mean Rome provides no workable institutional blueprint, scholars have nonetheless drawn valuable lessons from that republic's experiences with prerogative power.² What I here add to our Roman gleanings grew from a realization prompted by two scholars of American prerogative. Ben Kleinerman and Clem Fatovic asked me: how did the Romans justify the dictator's prerogative powers? But there is little evidence the Romans considered prerogative in need of justification in the first place. If the Romans saw prerogative as a natural bedfellow of republican government, why don't we? The Romans valued accountability, freedom, and protection from domination, though not in precisely the sense we do. And yet prerogative seemed natural to them. How is it, then, that it is so problematic for us?³ This paper will argue that among the reasons for the evident contrast found in the American approach to prerogative power is the centrality of 'writtenness' in our understanding of constitutional government.

In what follows, I begin by considering some common modes of arguing against prerogative, showing that there is a consequential distinction between the legitimacy of prerogative as such and legitimate concerns about its use. In light of this distinction, the inevitable dangers of various forms of prerogative, widely discussed by political thinkers past

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and present, do not suffice to show its *illegitimacy* as an institution. Neither could an historical fear of tyranny be sufficient to explain our contingent attitude toward prerogative, because this fear was fundamental to Roman constitutional thought also. Nor can we lay the blame for our concerns on this institution's incompatibility with republicanism, since nearly every republic has had institutions, formal or informal, to exercise such powers and most republican and classical liberal political thinkers, including Locke, Machiavelli, and Rousseau, have advocated some version as a matter of course.⁴ As a mainstay of both republics and republican thought historically, prerogative power has also included among its advocates several of America's founding fathers.

While some of these potential explanations provide pieces of the puzzle, I show that none is sufficient to account for our sense that prerogative as such lacks legitimacy. So I will argue that there is an additional element, rarely noted, but worth taking seriously, and this is evident in a fundamental difference in the way in which the Roman and American constitutions are perceived with respect to the role of flexibility and flux in maintaining stability generally. Prerogative is an institution that enables states to respond flexibly to novel circumstances or crises, so unease with flexibility and flux generally would yield unease with prerogative.

The Romans held fast to what we might call a tradition of innovation, a fundamental commitment to evolving institutions, matched to the times. By contrast, a common American perspective holds that only institutions described in a fixed, written constitution can provide stability and a bulwark against abuses of state power.⁵ Here, prerogative, as a mode of flexibility, would seem an assault on, not a natural element of, a constitutional democracy. As Balkin and Levinson have noted, "If Americans know one thing about their system of government, it is that they live in a democracy and that other, less fortunate people live in

dictatorships.”⁶ In this context, it is understandable that prerogative, as a form of flexibility that can look like dictatorship, would raise legitimacy concerns.

While I will not argue that a conception of the American constitution as a single written document is the only explanation, I hope to show it is not least among them. And while I will certainly not argue that prerogative is always safe, nor intervene in current debates about optimal institutional design, I hope to show that, in a republic, this institution *can* be legitimate. Here I keep company with a number of American scholars who have argued that either prerogative or some form of dictatorship is compatible with a republican constitution.⁷ What I hope to add to their accounts is a partial explanation of resistance to their conclusions.

1. 0 Prerogative Power & Constitutions

I follow Locke in defining prerogative as action for the public good in the absence of or even against the written law.⁸ And like Locke, it is my contention that prerogative is consistent with constitutional government. In Lockean terms, it accords with the law of nature, and in ours with the rule of law broadly conceived. For, the rule of law does not negate discretion, but only requires it to be constrained to the extent possible. The place of prerogative is precisely here by definition: where law has run out but action is required anyway. Prerogative would remain consistent to the extent that the principles governing the execution of the law informed the use of prerogative also.

Not all prerogative responds to an emergency. Other necessities such as those met by an exercise of eminent domain power are arguably aspects of (legislative) prerogative also, and in most liberal constitutional jurisdictions, prerogative power with respect to different matters is distributed among the branches of government. Indeed, at root, prerogative is nothing more than a legitimate but unwritten capacity, and it is part of the structure of every

political office, even of every human social relationship. With every position we have in respect to one another comes implicit or explicit permissions and obligations, which are understood to be legitimate to the extent they meet with an often unspoken but mutually understood set of criteria. With respect to an office, prerogatives are defined in part by the responsibilities of that office, and partly by its powers. Arguably, the American President must have the *power* to uphold the oath detailed in Article 2 Section 1 if he has the strict *duty* to uphold it, whether or not this explicit power is delineated.⁹ As our agents, we expect office-holders to meet their responsibilities toward us and we hold them accountable when they do not, even when the relevant powers are nowhere written.

Prerogative power of these various kinds – where the law is silent and sometimes even in violation of the law - stands as part of a venerable tradition in the legal precedents and customs of republican regimes like Rome and in the common law of Britain and other parliamentary regimes, from whence it derives some legitimacy. One can also make strong arguments in favor of its political-moral legitimacy.¹⁰ Even where prerogative institutions form no part of a *written* constitution, they may nonetheless be legitimate.

I am here defining a constitution as a set of enforceable¹¹ rules and procedures for the conduct of government and the relationship between state and citizens. Constitutions delineate the powers associated with an office and the relationship between those offices. And they express, implicitly or explicitly, the principles and values that ground the political community. In most modern constitutions, these rules, procedures, and principles are concentrated primarily, though not exclusively, in a written document or documents. While we may associate constitutions with legislation that is particularly well entrenched, entrenchment can take a number of forms and some constitutions (e.g., those of Canada, the UK, Israel, New Zealand, etc.) have elements that, at first glance, seem to be everyday

legislation, subject to revision or rejection by simple majority. But formal legal hurdles are not the only way to slow or prevent change, and conversely, a super-majoritarian requirement is not confined to constitutional legislation. Technical entrenchment is neither necessary nor sufficient for written legislation to have constitutional status.

In addition to these less formally entrenched pieces of legislation, all constitutions have unwritten elements, and constitutional change is frequently extra-legal. This is necessarily the case in part because no constitution can set out every rule required to operationalize government. Over the course of time, an array of precedents in the form of constitutional conventions or norms arise that translate written rules into government-in-action and regulate unforeseen elements of government business. Some of these become so familiar that many citizens, while aware of the rule, are unaware it was never written.¹² Others become almost invisible, seemingly obvious. Such rules can be reinforced by their usefulness as equilibria, or by their foundation in the actions of great men. For example, Washington's refusal to serve multiple terms became a constitutional convention, long before the relevant amendment inscribed what FDR had eventually flouted.¹³

The importance of the unwritten elements of constitutions, though not newly noted, has until recently been underestimated.¹⁴ Among these elements a central type is the constitutional convention: unwritten norms that regulate the behavior of political actors in a way that is parallel to normal constitutional provisions.¹⁵ Jon Elster recently suggested that constitutional conventions depend on a shared, true belief that "violations will be [or would have been] sanctioned."¹⁶ These sanctions may be non-legal, but they are sanctions nonetheless. In this sense, "political life has many invisible [constitutional conventions that]... prevent certain proposals from even coming to anyone's mind."¹⁷ These conventions may arise following incisive action in the face of crisis. They may reflect an equilibrium on which actors

have settled. Or they may be the logical consequents of principles underlying the constitution. However they arise, they clearly impact what is considered acceptable and unacceptable behavior for citizens and officials and violations of these conventions can be punished severely in the political sphere. These conventions oversee a substantial part of how every modern government functions, including America's. Indeed, "American constitutional conventions...implement and control much of the text of the Constitution."¹⁸

2.0 Why Reject Prerogative?

If we understand prerogative as power exercised in the absence of or even against the written law in the service of the public good, and we understand constitutions as the rules and conventions that dictate the form, extent, and processes of government, then prerogative could be a coherent part of republican government: a set of powers exercised when necessary, in accordance with normative but often unwritten conventions. And because the flaunting of conventions remains subject to oversight and sanction, there is no reason in principle why the exercise of prerogative could not be subject to accountability too. Prerogative in a constitutional republic is, thus, at a minimum, conceptually coherent.

But scholars advance a variety of objections to prerogative: that it concentrates power dangerously, that it weakens republican spirits, that it leads to tyranny, that it is sometimes hard to tell when it is *used* legitimately, and that it was rejected by America's wise founders. In this section I consider some of these, showing that, while some have force (and others do not), they ultimately supply insufficient grounds for rejecting the legitimacy of prerogative as such.

Perhaps the most obvious objection to prerogative is that it gives state actors too much power, a view some of America's founders, particularly Charles Clay and Patrick Henry, would certainly have supported.¹⁹ Many early American political thinkers conceptualized the

constitution as fundamentally geared to protect citizens from government, a view that remains powerfully evident in aspects of contemporary popular discourse.²⁰ Recently, Hugh Liebert conjured Sulla and Caesar in the context of the Roman dictatorship to eloquently summarize this concern ...

“...Does the mere existence of an institution of such awesome power ...open a staging ground...which unscrupulous and ambitious men could use to attack and overturn the constitution? The mere precedent of such a position, even if it was once well-used, might be sufficient to soften republican spirits and ease the transition from citizen to subject.”²¹

Liebert acknowledges that the danger of centralized, concentrated power stems not only from what can be done with that power directly. The experience of being thus ruled, he suggests, may make citizens forget or devalue that they rule themselves. In short, could not prerogative support demagoguery, which, as the ancients argued, paves the road to tyranny?

If it encourages citizens to bow to a yoke and leaders to take up the whip, prerogative, in a republic, even if conceptually coherent, might be profoundly undesirable. To accept this would require evidence that prerogative in fact functions this way, as well as a sound assessment of the consequences of rejecting prerogative. It is beyond the scope of this paper to establish with certainty that the use of prerogative has *never* led to weak citizens and tyrannical government. But it is clear that, at least in Liebert's case of Sulla and Caesar, the evidence does not support this fear. It was 120 years after the dictatorship had fallen into disuse that Sulla and, still later, Caesar took that office, so if the people had been made 'weak' and easily cowed by the existence of the dictatorship, this would have been action at a distance indeed. Why would it have taken more than a century for an ambitious leader to take advantage of this condition? Furthermore, over that period, so far from becoming weak, the

plebs had *increased* their power and influence. We would do well to remember that it was the rowdy support of plebeian troops that gave Julius Caesar the power to take on the name of dictator, not a dominating Caesar who stomped on a weak and cowering citizenry.²²

That proper use of prerogative may have limited negative externalities is small comfort to some. They worry that prerogative can be abused. Abuses of power, while by definition *not* exercises of Lockean prerogative, are all too often cloaked in the same rhetoric. How can we tell, at the time, which is which? Furthermore, it is easy to conflate the moral character of specific uses of prerogative with questions about the legitimacy of prerogative itself, and this is particularly true when prerogative is used to confront an emergency. This moral character is determined by a number of factors. These include: the legitimacy of the source of emergency power, the moral character of the ends to which it is set, the exogenous effects of the means used to accomplish those ends, proportionality, ‘mission creep,’ the effects of secrecy on accountability, and concerns about the epistemology of recognizing an emergency. In the wake of Carl Schmitt’s infamous claim that the capacity to call an emergency (or, properly, state of exception) into being is the mark of sovereignty, this last point in particular generates great concern.²³ It is not just the way prerogative is used that is open to abuse but the occasions on which it can be invoked.

As Clinton Rossiter has shown in his definitive treatment of the history of constitutional prerogative, the risks of employing such power are real, but the risks of *not* invoking it are equally real, and, on balance, Rossiter’s history suggests, prerogative in an already healthy constitutional democracy has net positive results, even when the regime does not return to precisely its former condition.²⁴ Despite these risks, prerogative is not tyranny, as some scholars have suggested.²⁵ By definition, it serves the public good.

While we must, conceptually, take care not to conflate the abuse of prerogative with its

legitimate use, we must also engineer, in practice, disincentives to abuse it. The task is to design optimally effective constraints, informal and formal, a challenge that has been the subject of extensive scholarly debate in recent years.²⁶ While, despite our efforts, we have settled on no blueprint to make prerogative definitively safe from abuse, we have, historically and under contemporary modes of government, found a variety of ways to hold prerogative power somewhat accountable. Such means have included, but are not limited to, oversight committees before the fact, Royal Commissions or Acts of Indemnity under British law after the fact, media scrutiny and elections.

In light of this, some might question what we should make of the apparent decision *not* to institutionalize prerogative powers in America's (written) constitution? To explain this, one cannot simply gesture toward some special sensitivity stemming from America's origins in the rejection of tyrannical rule, because, after all, Rome was also founded with the rejection of tyrants. But, while many of the founding fathers were deeply concerned about concentration of power, the decision not to formally institutionalize prerogative in the written constitution, did not, for others, preclude support for an unwritten constitutional (or extra-constitutional) prerogative institution. For example, Clem Fatovic has shown that both Hamilton and Jefferson relied on conceptions of prerogative in their thought and action.²⁷ Fatovic demonstrates that Hamilton supported a conception of prerogative grounded in the notion that the executive maintains residual powers, implied by the ends he is obligated to meet, an understanding supported by the Supreme Court's decision in *McCulloch v. Maryland*. Hamilton understood that constitutions are not exhausted by their written content. Jefferson, who understood himself to be exercising prerogative in, for example, the purchase of Louisiana,²⁸ saw prerogative as extra-constitutional, as an exercise of power against the law, or without the sanction of law (which he understood as the same). The virtuous executive,

then, admits his fault, requests post hoc ratification, and accepts the consequences if it is not forthcoming. Thus, Hamilton is a true Lockean, while Jefferson's perspective demonstrates a common theme with the Extra-Legal Measures model rigorously espoused in contemporary debate by Oren Gross.²⁹ Gross is but one among many scholars who accept prerogative as an inherent part of constitutional government and not an aberration of it,³⁰ while demanding caution with respect to its dangers. The rejection of a formal institution for the exercise of prerogative does not reflect the founders' rejection of prerogative as such but rather a preference (or, more accurately, diverse preferences) for informal prerogative, whether institutional, as Jefferson conceived it, or, with Hamilton, as something decidedly beyond the scope of the constitution, yet sometimes still justifiable.

I want now to suggest that it is precisely here that part of our resistance to prerogative is born, in the idea that the constitution might be flexible. It is clear why we are and should be concerned about specific exercises of prerogative, and why we should design and employ such institutions with great care. Such claims are indisputable. But it is less clear why we are resistant to the idea that constitutional government and prerogative are consistent, or even necessarily interdependent. Perhaps one reason for this hesitance stems from the fact that prerogative involves shifts in institutional structure, the capacities and relations of offices. This seems to contradict our notion that a constitution as a single, written document that delineates one shape for government. On that view prerogative can *seem* like an attack on the constitution and hence on stability.

America has "a" form of government, on one common view, which was instituted in 1787 and has continued much the same ever since.³¹ In one sense, this is true. There has been tremendous stability in certain core features of American institutions. But it would be as easy to argue that America's government has altered profoundly in the last two and a half centuries,

that flexibility and flux have always characterized American government *along with stability*.³²

Stability and flexibility are, after all, not mutually exclusive, as the Romans understood. I now turn to exploring this contention.

3.0 Perceptions of Prerogative Power in Rome

From our best evidence, the Romans seemed at ease with prerogative power. They also, I will now show, understood flexibility and stability as intertwined. Arguably, the latter explains, in part, the former.³³ Given that the Roman example inspired so much in the history of political thought and particularly in the thinking of America's founders, this is particularly striking. After all, the Romans, like us, valued separated powers and something akin to individual rights and protection from domination, and their republic, like the American republic, was founded on a tale of resistance to tyranny. The Romans did not fear the office partly because, in practice, it was effectively checked,³⁴ but also because the dictatorship was understood as a legitimate part of their flexible constitution and an extension of everyday consular powers. They had little reason to question its legitimacy. In light of contemporary American concerns, this Roman attitude is intriguing. To explore it, I begin with a brief overview of the institution, and its place in the Roman constitution. Then I turn to the flexibility and flux of the Roman constitution, and the place of the dictatorship within it.

At the dawn of the Republic, the Romans faced a problem. Both for ceremonial religious purposes and from a strategic perspective, they needed a pseudo-king. But they had just expelled their king whose rule they associated with corruption, or so much later annals suggest.³⁵ Through the early years of the republic, two institutions were proposed to address this dilemma. The first was the consuls, originally called praetors, elected for one-year terms. The two consuls served many kingly functions – making war, attending to symbolic religious

duties, meeting with foreign embassies, and hosting elections and games. While the tenure of the Tarquin kings was purportedly confirmed by popular assent, so the idea of a democratic element was nothing new, in contrast to kings, consuls' behaviour was constrained by their quite brief term of office. The collegiate nature of the office (either consul could veto the others) is sometimes considered another constraint, but Andrew Lintott has argued that the dual magistracy was intended primarily as a means of managing an array of duties by dividing these between them, as for example conducting battle in different theaters.³⁶

The second institution, the dictatorship, was proposed shortly after as a sort of super-consulship, a magistracy called into effect to deal with special circumstances and crises.³⁷ Where the constraints on the consuls might interfere with the effective execution of strategic and critical action, or where the consuls were unavailable, the dictatorship could fill in the gaps. This was important because the design of the Roman republican constitution had an array of safeguards, some of which would need to be muted in a crisis. These included a range of veto points generated by, for example, the system of consular colleagues, the Tribunes (representatives of plebeian interests), and the popular right of *provocatio* whereby the people were the ultimate court of appeal on capital crimes. In addition to these vetoes, the Senate, the people, and the magistrates all wielded different types of power and different specific powers which could be exercised only in divided spheres of authority. If one then, in addition, considers how often the consuls were abroad in their role as generals, the dictatorship looks like a fine idea. Urgent matters might call for an immediate source of decisive action that was not necessary day-to-day. The dictatorship, as an intermittent institution, filled this role.

Among its safeguards were the fact that the power to institute the office was separated from the power to choose its occupant and the office was always paired with a specific task and a six-month time limit. And among its special powers was that, for the first half of its

existence, it was exempt from the *provocatio ad populum* – the peoples’ right to decide on capital cases. This was rarely relevant, since most dictators held military commands outside Rome where the *provocatio* did not apply anyway. Occasionally dictators were appointed for internal tasks, such as to deal with plagues or host elections or games if the consuls were dead or abroad. There was also an infamous kind of dictatorship named to put down sedition. Ironically, this rarely used feature nearly always resulted in a legislative compromise to the advantage of the plebs. On seven occasions, significant constitutional revisions benefiting the plebs were achieved in this way, with a dictator proposing legislation to which the people gave their enthusiastic consent.³⁸ This looks entirely rational if we consider that the army was made up predominantly of plebs, and like Weber tells us, the most powerful person conceivable is dependent on his soldiers to fire when commanded. Ultimately, the dictator had to co-opt and not just coerce.

The Romans seems to have thought that, on balance, they had little to fear from the dictatorship, so long as constraints such as the time-limitation, the careful selection of the office holder, etc. continued to operate. For centuries the Romans seem to have embraced the dictatorship as a good and useful institution, and were seemingly wise to have done so. In order to understand how and why the prerogative powers of the dictator were seen as unproblematic from a legitimacy perspective, we now take stock of the available evidence. Of course we have no polling data of popular views on dictatorship, but we have several other kinds of evidence.

First, and most obviously, there is no positive evidence that the Romans *did* consider the dictatorship problematic. Nor can this silence be taken simply as a sign of objectors’ powerlessness. It is by now a commonplace in political science that silence should not be taken as an indication of consent.³⁹ And historiographers often underline that the views of

common people are difficult to discern because limited literacy means a limited written record of their perceptions. But these objections hold little weight here. The historical record shows an extensive array of cases in which the plebeians – those Romans one might have thought were *least* powerful - nonetheless *did* object to elements of the constitution. For example, they very clearly show their power and make their voices heard in Livy's account of the century long Conflict of the Orders.⁴⁰ In the course of this engagement, the plebeians gained greater and greater constitutional power (which Sulla later tried to 'correct').

As further evidence, while Romans show little sign of objecting to the dictatorship as an institution, there are instances where they objected to a specific dictator or task. Furius Camillus, for example, was a popular hero.⁴¹ He was named dictator for the fourth time in 365 BCE because the people refused to elect consuls until the senate would agree that one of these consuls could be a pleb. The Senate had hoped Camillus would settle the dispute but, "[w]hether ... he feared another banishment or condemnation which would ill become his age and past great actions, or found himself unable to stem the current of the multitude, which ran strong and violent, he betook himself, for the present, to his house, and afterwards, for some days together, professing sickness, finally laid down his dictatorship."⁴²

The fact that Romans in general and the plebs in particular objected to other institutions, and the fact that they could so effectively object to specific dictators strongly suggests that they could have objected to the dictatorship if they had wished. And if they had, we likely would have heard about it. But we have no record that they did object, so it is reasonable to conclude that, in fact, they accepted the institution as legitimate. This seems reasonable in face of the evidence. Even if the institution had seemed strange to them - and I will next turn to arguing that it would have been quite familiar - dictators so often acted to support plebeian interests and so often 'saved the day', that the average Roman would likely

have agreed with Machiavelli that it was a very great thing to have such an institution.

Even if this had not been so, there were at least three good reasons for the people to accept the dictatorship as legitimate, even natural. First, the institution was common in governments of the region. Second, the dictatorship was just one among many intermittent institutions the Romans made use of. And, third, the Romans were quite proud that their government was evolving and flexible, what we might call their tradition of innovation.⁴³

Dictatorships were a normal part of Mediterranean constitutions at the time Rome became a republic. The Romans did not invent the institution as we often assume. Rather there is evidence that it was widespread among their Latin neighbors and existed among the Greeks and Carthaginians also.⁴⁴ It is likely the Romans would have seen a dictatorship as a normal aspect of the machinery of good government, in the way that citizens and drafters of contemporary constitutions assume a constitutional court would be wise: even when there is controversy about its form and powers, there is wide agreement that government is better off overall, with some such institution.

And dictatorships were not just a normal part of governments of the region; they were also a surprisingly 'normal' magistracy in republican Rome. There were 96 or 97 dictators in the roughly 300 years the institution was in use, or about one every three years.⁴⁵ Some of these served ceremonial functions, such as holding elections in the absence of a consul or hammering putatively plague-preventing nails into the Capitoline Temple, while others served a military function. Dictators were merely special magistrates.⁴⁶ They were listed among the regular magistrates on the consular *Fasti* as though the office were one among others. And although the office had superlative features, for instance *more* lictors than a consul would have, the features they did have were extensions of existing offices.

In a recent dissertation, Easton has argued – perhaps too strongly - that the idea of the

Roman dictatorship as unchecked, as exhibiting a royal rather than a republican prerogative, arose because...

...accounts of all-powerful dictators presented by authors of the late Republic were influenced directly by Sulla, who introduced a different and *truly unrestricted form of the dictatorship* onto the Roman political scene in 82[BCE].

Late Republican commentators, writing in the aftermath of Sulla's regime, were so influenced by him that they viewed all Republican dictatorships with *a priori* assumptions of dictatorial supremacy and thus erroneously applied the post-Sullan form of the office to all dictatorships from the Republican period.⁴⁷

He is surely right that Sulla had an impact, coloring our readings of these *authors* whether or not the authors themselves were so profoundly affected.

And while the dictatorship's character as intermittent certainly helped emphasize the seriousness of a situation – a function that declarations of states of emergency continue to serve - intermittent does not mean abnormal. Romans made ample use of this type of on-again, off-again institution, changing their form of government for short periods to suit the situation. The dictatorship was decidedly not the only such institution. There were also a variety of *decemviri* –councils of ten - for different purposes. For example, there was the council of ten appointed to write the laws of the Twelve Tables, and councils of ten were periodically appointed for the purpose of redistributing land. There were also stretches when the plebs refused to elect consuls and elected consular tribunes instead, according to their right. So the Romans were quite at home with political institutions which were only sometimes in effect. They matched the institution to the task or the times, and, recognizing that some tasks were time-delimited, they had institutions that were similarly limited. In this respect also, the

powers called into being when a dictator was in office were ‘normal’ and not something that necessarily cried out for special legitimation.

Furthermore, the institutional flexibility evident in the widespread use of intermittent institutions was part of an overall perception that an effective constitution or system of government must respond to changes in political conditions. Evidence of this perception, at least in the late republic, can be found in views attributed to both patrician and plebeian figures. From the patrician perspective, we find in Book Two of Cicero’s *De Republica*, Scipio Aemilianus – through whose voice Cicero speaks - explaining to his companions that:

Our Roman constitution... did not spring from the genius of an individual, but of many; and it was established, not in the lifetime of a man, but in the course of ages and centuries. For ... there never yet existed a genius so vast and comprehensive as to allow nothing to escape its attention, and all the geniuses in the world united in a single mind, could never, within the limits of a single life, exert a foresight sufficiently extensive to embrace and harmonize all, without the aid of experience and practice.⁴⁸

Constitutions must be adapted and citizens must be open to their constitution’s improvement and perfection (in the Rousseauan sense).

Livy attributes a speech to the Tribune Canuleius (445 BCE) expressing similar sentiments. On the subject of intermarriage between plebs and patricians, Livy has Canuleius say:

Ought no innovation ever to be introduced; and because a thing has not yet been done... ought they not to be done, even when they are advantageous? In the reign of Romulus there were no pontiffs, no college of augurs; they were created by Numa Pompilius. There was no census in the State, no register of

the centuries and classes; it was made by Servius Tullius. There were never any consuls; when the kings had been expelled they were created. Neither the power nor the name of Dictator was in existence [in Rome]; it originated with the senate. There were no tribunes of the plebs, no aediles, no quaestors; it was decided that these offices should be created. Within the last ten years we appointed decemvirs to commit the laws to writing and then we abolished their office. Who doubts that in a City built for all time and without any limits to its growth new authorities have to be established, new priesthoods, modifications in the rights and privileges of the houses as well as of individual citizens?"⁴⁹

While of course we can't know with any certainty whether this *was* the view of Romans at large, it is reasonable to assume that it was at least widespread among reflective Romans, whether of patrician or plebeian heritage. This is particularly noteworthy given the explicit contrast with the Greek tradition of the wise lawgiver. It was something the Romans considered *special* about their constitution, something that contributed to its excellence. Historians of Rome, including Livy, Cicero, Plutarch, Polybius etc., emphasize constitutional developments almost as much as they emphasize the history of military engagements. Even when dictators changed the constitution, as they sometimes did, this functional capacity was itself a kind of business as usual in the Roman context, where, so long as the people consented, it was not unusual for a variety of office holders to suggest legislation that changed the shape of offices. In such cases, dictators merely took the place of the senate and consuls in proposing legislation to which the people still had to give assent. It was always ultimately the peoples' prerogative to pass legislation, and who took the role of proposing it was secondary.

In this specific respect, the Romans were arguably more egalitarian than Americans. While many Americans attribute genius to the drafters of their constitution - placing the fruit

of “The Founders” labors behind bullet proof glass in a shrine, and crediting them with a superhuman wisdom and foresight - the Romans saw the process as a collective one that went on through time. The 'founders' of republican Rome receive only limited credit for institutional design. While Junius Brutus, for example, is lauded, his fame is based less on his status as an ‘author’ of Roman institutions, than as the defender of a republican system of government more generally.

Like the Americans, Romans prized the principles or values on which their constitution rested. But they saw these principles, rather than a document, as the root of the constitution. Constitutional innovations could thus be made on the basis of these principles, while the form of government remained the same. This was true until Sulla, whose example was followed by Julius Caesar. Then Augustus turned the constitution on its head, keeping the shape of institutions the same, while utterly changing the form of government. The emperor, after all, was not an emperor at all but rather a *Princeps* - first among equals. Augustus was indeed a great traditionalist, drawing much of his authority from a cunning form of what one might call radical progressive originalism.

Constitutional change is normally grounded in arguments about principled continuity of some sort. This remains true well into the imperial period.⁵⁰ Even Canuleius’ speech refers to the Roman *tradition* of innovation. Roman traditionalists who longed for ‘the good old days’ were not interested in a restoration of institutions as they stood following the expulsion of the Tarquins, but in the maintenance of Roman principles and ways of doing things, both of which could, of course, shift over time. The very idea of the *mos maiorum*, the traditions of the ancestors, and the profound respect it commanded shows the extent to which forms of traditionalism and forms of flexibility could coexist. But traditionalism is never pure originalism. Those who, with Sulla, regretted pro-plebeian institutional changes never

advocated a return to the past in institutional terms. Contestations in all these cases draw on aspects of innovation and aspects of imitation, and what they contest is the actualization of principles, rather than an empty formalism about the ‘proper’ shape of institutions. Sulla sought to restore the principles that he understood as underlying Roman government, not the “original” form of Roman government.

In this context, it is also noteworthy that the Romans did not understand institutional change as necessarily progressive. While there are aspects of progressivism in Roman rhetoric about constitutional change, one can as easily understand the enterprise as one of adaptation to flux. Some adaptations led to substantial improvements in the Roman form of government, others helped Rome maintain the status quo when circumstances had changed, and still others might, in retrospect, be understood as dangerous or even disastrous. Not all change is good change, but no change, when circumstances have saliently changed, is certain to be disastrous.

Because the prerogatives of the dictatorship were limited, because the institution was widespread in constitutions of the time, because intermittent institutions were a normal part of Roman government, and because flexibility and adaptation were considered positive and critical aspects, it makes sense that the prerogative powers associated with the dictatorship struck Romans as a natural part of government. The Romans did not actively seek to legitimize the dictatorship as an office because it would not have seemed to them actively in need of special legitimacy.

Scholars and citizens sometimes ask how prerogative power could be legitimate and it may shed light on this question to consider how the Romans, our political-intellectual forebears, came to see it as legitimate. In fact, the evidence we have suggests the Romans did not question its legitimacy in the first place. They were quite at home with the institution.

So what makes prerogative seem so strange to us? I will now argue that, while our modern constitutions are remarkably similar with respect to flexibility and flux, our perceptions are clouded in part by misplaced fears about instability.

4.0 A Fixed Constitution?

The Romans were proud of their flexible constitution. Shaped by the collective wisdom and experience of generations, it was comprised partly of written laws (*lex*) and partly of convention (*mos*). By contrast, reference to the American constitution is commonly reference to a single written document. Constitutional scholars like Jed Rubenfeld argue that ‘written-ness’ is inherent to solid constitutions, a valuable American innovation.⁵¹ And it is the assumption that the constitution “is” this written document that makes some versions of originalism possible. The American constitution is described as the oldest *written* constitution⁵² and children are taught this document is what the constitution *is*. While the citizens of many polities understand their constitution as written, the centrality of its physicality – as a piece of parchment a pilgrim can visit and revere - is perhaps unique in America.

If the constitution just *is* that document, change looks like corruption. And if the document, at its origin, largely got things right, then flexibility is all the more worrying. The issue of deviation from origins arises often in American public discourse.⁵³ Could this focus on fixity *partly* explain prerogative’s legitimacy problems? If the form of government is perceived as set, maybe any mode of flexibility looks dangerous. Furthermore, a core role of a constitution is the maintenance of predictability through establishing equilibria and publishing the rules of the game. It is difficult to act strategically and difficult to plan if one doesn’t know what one’s rights will be, or what the shape of government, some weeks or years away. Stability *is* critical, and if stability did preclude flexibility, this should prompt caution.

And some might argue that, once a state of functional compromise has been achieved, any attempt to tinker with this optimal - if less than perfect – condition may well result in something worse. This was one part of Benjamin Franklin’s view. “I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us,” he wrote and went on:

I doubt too whether any other Convention we can obtain, may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? ... The opinions I have had of its errors, I sacrifice to the public good... Much of the strength & efficiency of any Government in procuring and securing happiness to the people, depends on opinion, on the general opinion of the goodness of the Government, as well as of the wisdom and integrity of its Governors.⁵⁴

On this view, even if the constitution is less than perfect, the chance of improvement is not worth the risk of foolish or short-sighted changes, the mere proposal of which might shake the confidence of the people in their form of government generally. This is a moderate version of the Rousseauian idea that we *ought* to believe a peak of wisdom was reached at the moment of founding, that somehow the men who framed the government had some insight or inspiration we can’t hope to match. Clearly, Franklin did not think this was actually the case. But there are elements of this belief in American public discourse. The word ‘founders,’ for instance, is often capitalized, like the title of another lawgiver we can think of.

But these concerns about stability and its relationship to flexibility rely on the assumption that circumstances could not change so substantially that institutions would need to adapt. In Chicago, a skyscraper not built to move with the wind wouldn't stand for long. And while the widespread perception that America's constitution is fixed persists, this perception is false. The recent explosion of legal scholarship primarily geared toward debunking this view serves as evidence for how pervasive it has been until now.⁵⁵ And in line with this recent scholarship, I argued above for a more expansive understanding of what the constitution 'is,' emphasizing the importance of constitutional conventions. In addition to such conventions, Vermeule has demonstrated the centrality of intermittent institutions in America. Like the Roman versions, these are institutions only sometimes in effect, called into being as needed. In the American context, these include juries, the Electoral College, special prosecutors, military tribunals, congressional committees, etc.⁵⁶ So far from fixity, the shape of American government shifts in the everyday course of things to best meet circumstance.

If citizens were more awake to these empirical elements of fluidity and flux, prerogative as an institution might seem more legitimate. Stability does not preclude elements of flux and flexibility, particularly if flux is understood as normal. The stability of government is always relative to the conditions of government. If times change, temporarily or for the long term, government institutions may cease to be effective. Under such conditions, if government remains the 'same', it might not remain stable. *De facto*, contemporary governments respond to these shifts, just as the Romans did. Without the array of written amendments and the shifts in unwritten constitutional norms, America's constitution would no longer be appropriate to govern a contemporary state.

Stability is compatible with flux and flexibility because while laws and norms shift over time, the core can remain. The application of constitutional and legal rules is always

anyway underdetermined. As we learn from Wittgenstein, “going on the same way” is a deceptively simple idea.⁵⁷ But under-determination does not mean any old course will do. Constitutional change or institutional shifts of any kind, whether by formal amendment or the reform, abolition, or inauguration of a constitutional convention must be done on the basis of *grounds*. De facto, the array of grounds on which constitutional rules rest are diverse, embracing “any combination of text, history, policy, precedent, and morality,”⁵⁸ and the array of constitutional functions provide diverse grounds for contesting the meaning of constitutional rules and going on in an assortment of ‘the same ways’. One can maintain the same form of government, even while “changing the number of magistrates,” in Sidney’s words, so long as “the root and principle of [their] power continues intire.”⁵⁹ The Romans continued to have a republican form of government, even when there were consular tribunes in place of consuls, even when there was a dictator or decemvirate. When a royal commission is struck in Canada, there is a new element in the order of government, but the government ‘goes on in the same way’. Prerogative, on this view, so far from precluding stability, may be a key tool in maintaining it.

Some states have actually incorporated this idea of stability compatible with flux and flexibility *into* a constitutional convention. For example, in Canada the idea that the constitution is a ‘living tree’ – a metaphor coined a century ago - is now accepted as a principle of constitutional interpretation. Drawing on Lord Sankey’s decision in the famous *Persons* case, the metaphor is meant to illustrate that solid roots need not preclude (path-dependent) change and growth. The court can at once respect the origins of the various documents and pieces of legislation that make up the Canadian constitution while allowing the constitution’s meaning to grow to reflect the society it serves to organize.⁶⁰

To embrace a tradition of innovation allows us to navigate between those who, following Burke and other ‘minimalist many-minders,’⁶¹ look mostly backward and those forward looking liberal visionaries who see the world as full of possibility, with constitutional change as a mirror of popular will, simply speaking. Certainly, the fluidity and flexibility inherent in a tradition of innovation, and implicit but apparent in the function of most modern constitutions, can lead to conflict. But conflict is often prerequisite to managing complex situations in a morally honest and fruitful way. When competing but legitimate principles and precedents are in play, opportunities open up to acknowledge the reality of moral and political conflict. The tensions in constitutional debate echo the range of functions and the range of values embraced by every constitution and every people.

4.0 Conclusion

In a previous essay, I used the Roman case to show that our fear of prerogative when used to confront specific emergencies reflects a misconception about the nature of concentrated power.⁶² I showed that commentators follow Machiavelli⁶³ and later Rossiter⁶⁴ in consistently overestimating the range of the dictator’s power and discretion because they have underestimated the extent of the informal constraints under which he worked. This work on informal constraints on power shows why *specific uses of prerogative*, within the confines of well-designed institutions, may be less concerning than we think. Here I have gone further with the Roman example, arguing that resistance to the legitimacy of *prerogative as such* partly reflects changed perceptions, arguably misconceptions, about the flexibility of constitutions.

I have argued that concentrated power is not tyranny, even if it can be abused for tyrannical purposes. Prerogative can be legitimate despite its dangers. Oversight and accountability are conceptually compatible with concentrated power, even if it is difficult or

impossible to get the institutions precisely right. Hence, there is a difference between the legitimacy of prerogative as an institution and the legitimacy of any particular use of that power. In republican Rome, while specific uses of dictatorial power were certainly subject to public debate, the institution as such functioned as a natural and well accepted part of government as a whole, free from the legitimacy concerns that occupy us today. This was so at least until it fell out of use in the third century BCE. This was a change that responded to changed times, demonstrating the vibrancy of the tradition of innovation even here. The perception of the dictatorship's legitimacy through those centuries must have been profound for the shell of the title 'dictator' to confer a veneer of legitimacy on Sulla and Caesar more than a century later.

By contrast, prerogative in the American context has always had a legitimacy problem in theory, but has been freely used in practice. Historically Americans have sanctioned some specific uses of prerogative,⁶⁵ but the idea of prerogative power, the institution as such, causes great consternation in many quarters.

Why the difference between the Roman and American perceptions? I have been arguing that there are substantial parallels between the Roman and American constitutions with respect to their de facto responsiveness to changing circumstances. But there are substantial differences in the perception of those constitutions and the sources of their stability. However comfortable Americans are with the practice of flexibility, the idea of flexible institutions prompts fear.

Why so? The source of prerogative power, the means it employs, and epistemological concerns about its ends and our capacity to maintain accountability affect the legitimacy of specific uses of prerogative and prompt warranted concern. But I have been arguing that discomfort with the *idea of prerogative as such* stems in part from the centrality of the written

element of the US constitution coupled with the romance surrounding its origins. The disjunction between public perceptions of the constitution and its actual workings generates confusion. So long as we accept that 'going on in the same way' can look different depending on the social and political context, stability and flexibility are compatible.

Institutions must be understood in time as things that develop, shift, and change, and as things that must be capable of responding to the inevitable short and long term changes in the world around us. The idea that prerogative institutions *as such* (as opposed to any specific use of prerogative power) have a legitimacy problem seems also to reflect the idea that crises, the unexpected and the urgent are aberrant. But circumstances which are unexpected, urgent, or volatile, whether in the form of opportunities to secure the state against crisis, or whether they themselves constitute a crisis, are a normal part of the course of government and the course of institutions through time. This is so just as sickness is a normal part of human life over its course, and through time. If we accept this, there is no reason to assume that prerogative is something extraordinary or in need of some extreme form of legitimation. Prerogative *as such* can be legitimized with reference to the same kinds of justifications for which any other action is undertaken. At the same time, the normative criteria governing the legitimacy of specific uses of prerogative must be observed and enforced with vigor and extreme care.

Perhaps this betrays a too-Machiavellian assumption about the place of regimes in time, but while our job is to do our utmost to ensure that good constitutions linger as long as possible at their peak, sooner or later, whether it unravels slowly or explodes spectacularly, every constitution fails. The array of instances where this occurred through an attempt to restore what was 'original' is well worthy of note.

¹ John Ferejohn & Pasquale Pasquino. "The Law of the Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law*, 2 (2004): 210-239. I contest, however, their contention that the limits of the Roman dictatorship's usefulness in contemporary discussion stem from the new 'permanence' of emergency in the war on terror. This ignores emergency conditions' century of omnipresence, through world wars, the Great Depression and the Cold War. Indeed, emergency decrees were effectively in force in the United States between 1933 and 1975. Nor were the Romans strangers to near constant emergency, given how extensively and sometimes continuously the dictatorship was used, as we see throughout Livy's histories. It is noteworthy that Clinton Rossiter, in the conclusion to his book *Constitutional Dictatorship* (New Jersey: Transaction Press, 2002), e.g., p. 297, makes very similar comments about the "new" permanence of emergency with respect to the dawn of the atomic age.

² Such lessons pertain to, for instance 1) the informal constraint of prerogative power (Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113 (2004): 1029-1091; Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge: Cambridge University Press, 2009); 2) shifts in the concept of crisis, embracing domestic and socio-economic elements (Oren Gross, "The Concept of 'Crisis': What can We Learn from the Two Dictatorships of L. Quinctius Cincinnatus?" (May 20, 2005) 17th International Conference, Italy. Minnesota Legal Studies Research Paper No. 05-20); and 3) the possibility of dictatorship properly understood as constitutional, (Jack Balkin & Sanford Levinson, "Constitutional Dictatorship: Its Dangers and its Design," *Minnesota Law Review* 94 (2010): 1789-1866; Clinton Rossiter, *Constitutional Dictatorship* (Transaction Press, 2002); Carl Schmitt, *Die Diktatur* (Berlin: Duncker Humblot, 1994).

³ See Michael Genovese, *Presidential Prerogative: Imperial Power in an Age of Terrorism* (Stanford: Stanford University Press, 2010); Kalb and Kalb, *Haunting Legacy: Vietnam and the American Presidency from Ford to Obama* (Washington: Brookings Institution Press. 2011), 2. Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little Brown. 2007).

⁴ Balkin & Levinson note the importance of distinguishing Machiavelli's properly institutional approach from that of Locke. In the *Discourses*, Machiavelli stressed the cost to respect for the law of routinely breaking it, seeing a formal institution as a less dangerous means of approaching crisis than Lockean style prerogative. The issue, thus cast, mirrors the contemporary Gross-Dyzenhaus debate. Balkin & Levinson "Constitutional Dictatorship," 1801; Niccoló Machiavelli, *The Prince and Discourses*, Trans. Luigi Ricci and E.R.P. Vincent (New York: Random House, 1950), I.34; John Locke, *Second Treatise of Government*, ed. C.B. MacPherson (Indianapolis: Hackett Publishing, 2011), 160; on the Gross-Dyzenhaus debate see V.V. Ramraj, *Emergencies and the Limits of Legality* (Cambridge: Cambridge University Press, 2008); See also Jean-Jacques Rousseau, *Du contrat social* (Paris: Flammarion, 1992), IV.6.

⁵ Stephen M. Griffin, suggests that this is the "conventional understanding of the US legal community...." in "Constitutional Change in the United States," Tulane University School of Law, Public Law and Legal Theory Working Paper (March 2011): 23. See also Jed Rubenfeld, "Legitimacy and Interpretation" in *Constitutionalism: Philosophical Foundation*, ed. L Alexander (Cambridge: Cambridge University Press, 1998), 194-234.

⁶ Balkin & Levinson, "Constitutional Dictatorship," 1790.

⁷ See for example, Clinton Rossiter, *Constitutional Dictatorship* (New Jersey: Transaction Press, 2002); Carl J. Friederich, *Constitutional Reason of State* (Providence: Brown University Press, 1957); Balkin & Levinson, "Constitutional Dictatorship"; George Thomas, "As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government," *Presidential Studies Quarterly* 30 (2000): 534-52. Lazar, *States of Emergency in Liberal Democracies* (Cambridge, Cambridge University Press, 2009);

⁸ John Locke, *Second Treatise of Government*, ed. C.B. MacPherson (Indianapolis: Hackett Publishing, 2011), 160.

⁹ Hamilton makes versions of this argument in Federalist 23 and in his “Opinion on the Constitutionality of the Bank, 23 Feb. 1791, http://avalon.law.yale.edu/18th_century/bank-ah.asp. We find a similar view in *McCulloch v. Maryland* 17 U.S. 316 (1819). See also Lazar, *States of Emergency*, 97.

¹⁰ See for example, Lazar, *States of Emergency*, 81ff.

¹¹ Such enforcement can be formal and legal or informal / political.

¹² Jill Lepore, “The Commandments” *The New Yorker* (January 17, 2011).

¹³ Elster, “Unwritten Constitutional Norms” Working Paper on file with the author, 2010; See also James G. Wilson, “American Constitutional Conventions”, *Buffalo Law Review* 40 (1992) 645ff.

¹⁴ A recent explosion of exceptions include the following. William Eskridge Jr. & John Ferejohn. *A Republic of Statutes* (New Haven: Yale University Press, 2010) differentiate between a working or “small ‘c’ constitution” and the written document or large “C” Constitution. Ernest A. Young in “The Constitution Outside the Constitution” argues for a *functional* definition of the constitution in *Yale Law Journal* 117 (2007): 408-473. Akhil Amar also engages this subject in “America’s Constitution, Written and Unwritten” *Syracuse Law Review* 57 (2007): 267-287. See also Balkin & Levinson, “The Processes of Constitutional Change,” *Fordham Law Review* 75 (2006); Griffin, “Constitutional Change in the United States” *Fordham Law Review* 75 (2006); Cass Sunstein, *A Constitution of Many Minds*. (Princeton: Princeton University Press, 2011); Ackerman *We the People: Transformations* (Cambridge: Harvard University Press, 2000); Llewellyn, “The Constitution as an Institution,” *Columbia Law Review* 34 (1934); David A. Strauss, “The Irrelevance of Constitutional Amendments,” *Harvard Law Review* 114 (2001): 1457-1505; and James G. Wilson, “American Constitutional Conventions”, *Buffalo Law Review* 40 (1992).

¹⁵ Jon Elster notes that the common view that a convention exists if all the players concerned agree it exists, generates paradoxes. What if a Supreme Court decision regarding the existence of a convention stands on the basis of a majority but not a unanimous decision? For example, a ruling by the Canadian

Supreme Court on whether a particular constitutional convention existed yielded a 6/3 result. So did it exist or didn't it? A lack of unanimity would suggest it didn't, and yet that is not the usual decision rule. Elster, "Unwritten Constitutional Norms," 26.

¹⁶ Elster, "Unwritten Constitutional Norms," 29.

¹⁷ Elster, "Unwritten Constitutional Norms," 29. If it hasn't come to mind, can it be said to be a belief?

¹⁸ Wilson, "American Constitutional Conventions," 649.

¹⁹ This is evident, for example, from their discussion at the Virginia convention of the militia clauses in the constitution. *Elliot's Debates* Vol. 3 June 5th 1788. Accessed at <http://memory.loc.gov/ammem/amlaw/lwed.html>.

²⁰ See Benjamin Kleinerman *The Discretionary President* (Lawrence: University of Kansas Press, 2009), 74ff.

²¹ Hugh Liebert, Commentary on file with the author, March 2011.

²² As Machiavelli noted, power can take a title, but a title alone does not give power. *Discourses*, I. 34

²³ Carl Schmitt, *Political Theology* Trans. George Schwab (Cambridge, MA: MIT Press, 1985).

²⁴ Rossiter, *Constitutional Dictatorship*, 288.

²⁵ As, arguably, we find in Genovese, *Presidential Prerogative*, 26-27.

²⁶ See as a small sample: V.V. Ramraj, *Emergencies and the Limits of Legality*; Bruce Ackerman, *Before the Next Attack* (New Haven: Yale University Press, 2007); Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore: Johns Hopkins University Press, 2007); Kleinerman, "Discretionary President," Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006). An exception to the dearth of empirical work is Linda Camp Keith & Steven C. Poe, "Are Constitutional State of Emergency Clauses Effective?" *Human Rights Quarterly*, 26 (2004): 1071-1097.

²⁷ Clement Fatovic, "Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives," *American Journal of Political Science* 48 (2004): 429-444.

²⁸ See Jefferson's letter to Breckenridge of Aug 12, 1803 and his Letter to John Colvin of 20th September 1810. Available at <http://etext.virginia.edu/toc/modeng/public/JefLett.html>

²⁹ Oren Gross, "Chaos and Rules," *Yale Law Journal* 112 (2003): 1011-1134.

³⁰ Carl J. Friederich, *Constitutional Reason of State* (Providence: Brown University Press, 1957); Lazar, *States of Emergency*, 2009; Clinton Rossiter, *Constitutional Dictatorship* (New Jersey: Transaction Press, 2002); George Thomas, "As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government," *Presidential Studies Quarterly* 30 (2000): 534-52.

³¹ From the popular perspective, there is an interesting analysis of recent polling data reflective of this range of views in Penn Schoen Berland, *Does the US Constitution Still Work for 21st Century America?* (Aspen Ideas Festival, 2010).

³² Whatever their broader differences, many constitutional scholars are in agreement that the mode of government in the United States is never what it once was. See for instance Bruce Ackerman *We the People*; Jack Balkin & Sanford Levinson, "The Processes of Constitutional Change"; Stephen Griffin, "Constitutional Change in the United States," Tulane University School of Law, Public Law and Legal Theory Working Paper (2011): 11-03; Karl Llewellyn "The Constitution as an Institution".

³³ Of course, one must exercise as much caution in attributing a single view to 'the Romans' as to 'Americans' or any other large group that persists through centuries. But just as it would be reasonable, from our best evidence, to conclude – from a combination of historical texts and contemporary polling data - that Americans *on average* are proud of and pleased with their institutions, one can draw, from other types of evidence, similar conclusions about the Romans *on average*, without thereby asserting that each and every Roman held this view. See Harriet Flower, *Roman Republics* (Princeton: Princeton University Press, 2011).

³⁴ See Lazar, *States of Emergency*, pp. 127ff.

³⁵ Livy, *The Rise of Rome*. Trans. T.J. Luce (Oxford: Oxford University Press, 1998), 1.58ff.

³⁶ Andrew Lintott, *The Constitution of the Roman Republic* (Oxford: Oxford University Press, 2009), 100.

³⁷ It is noteworthy that our understanding of this institution is imperfect. It has been limited for two reasons. The first is the paucity of dependable contemporary source material. We have the consular *fasti*, which record the names of the office holders in each year of the republic (the years, in fact, were defined by these offices, rather than vice versa), and, where a dictator was appointed, the reason for the dictatorship was also recorded. In addition, we have a variety of inscriptions. But beyond these primary source materials, we are forced to rely on historical accounts of writers like Cassius Dio, Polybius, Cicero, Dionysius of Halicarnassus, and Livy. While not entirely unreliable, and while these secondary sources did have access to primary source material lost to us, their idea of history and ours are not entirely synchronous. For example, Livy puts words into the mouths of speakers that of course he could have no access to. Furthermore, like all historians, ancient and modern, these writers are not without their biases, ideological prejudices, and broader political aims. These are sometimes quite explicit, as in the case of Polybius, and at other times require a broader knowledge of temperament and historical situation, as in the case of Cicero. As a result, the dictatorship is not without its mysterious and seemingly contradictory aspects.

³⁸ Marianne Hartfield, *The Roman Dictatorship* (Doctoral Dissertation, Berkeley University, 1986), 276-279.

³⁹ John Gaventa, *Power and Powerlessness* (Chicago: University of Illinois Press, 1980).

⁴⁰ Livy, *The Rise of Rome*, 1.58ff.

⁴¹ Indeed, modern Rome has a metro stop named in his honor.

⁴² Plutarch, "Life of Camillus" in *Lives*, Trans. Bernadotte Perrin (Cambridge: Loeb Classical Library, 1914), 197.

⁴³ See also Adrian Vermeule, "Intermittent Institutions," *Politics, Philosophy, and Economics* 10 (2011): 439. Karl Popper refers to an approach like this in the scientific realm as a 'second-order tradition,' a tradition of critical innovation, in "Towards a Rational Theory of Tradition," *Conjectures and Refutations*.

(New York: Routledge, 1963). I'm grateful to Adrian Vermeule for bringing this reference to my attention.

⁴⁴ Jeffrey Easton, *A New Perspective on the Roman Dictatorship, 501-500 BC* (Dissertation: University of Kansas, 2010), 16.

⁴⁵ This is the estimate provided by Hartfield, *Roman Dictatorship, 276-279* in her catalogue of the documentation for each dictatorship.

⁴⁶ Lazar, *States of Emergency*, 129.

⁴⁷ Italics are mine, and indicate a point at which Easton and I part ways. Not even the dictatorship of Sulla was truly unrestricted. Easton, *Dictatorship*, 9.

⁴⁸ M.T. Cicero, *De Republica The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws*, Trans. Francis Barham (London: Edmund Spettigue, 1841), 204.

⁴⁹ Livy, *The Rise of Rome*, 4.4.

⁵⁰ We can see this in, for instance, a speech of Claudius, recorded on an inscription, which bases his case for welcoming Gallic senators on aspects Roman tradition.

<http://www.fordham.edu/halsall/ancient/48claudius.html>

⁵¹ Rubinfeld, "Legitimacy and Interpretation".

⁵² As is so often the case, San Marino is the polity that actually deserves that credit. It is the oldest continuous sovereign nation, and the oldest republic, with a written constitution dating to 1600.

⁵³ Americans consistently report that, overall, they are happy with their constitution as it was drafted, perceiving deviation as both unnecessary and dangerous. See Penn Schoen Berland, *Does the US Constitution Still Work*. However, such discussions, most recently, have concerned amendments protecting (or prohibiting) the right to marry for same-sex couples, preventing flag-burning, abolishing the Electoral College, etc.

⁵⁴ Benjamin Franklin, Speech of September 17, 1787, <http://www.usconstitution.net/franklin.html>, accessed January 15, 2011.

⁵⁵ Recent scholarship includes Eskridge Jr. & Ferejohn, *A Republic of Statutes*; Young “The Constitution Outside the Constitution”; Amar “America’s Constitution, Written and Unwritten”; Balkin & Levinson, “The Processes of Constitutional Change”; Griffin, “Constitutional Change in the United States;” Llewellyn, “The Constitution as an Institution;” Strauss, “The Irrelevance of Constitutional Amendments;” Sunstein, *A Constitution of Many Minds*; and Wilson, “American Constitutional Conventions”.

⁵⁶ Vermeule, “Intermittent Institutions,” 421.

⁵⁷ Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M (Anscombe. Oxford: Blackwell, 1963).

⁵⁸ Wilson, “American Constitutional Conventions,” 680.

⁵⁹ Algernon Sidney, *Discourses on Government*, (Union, NJ: Lawbook Exchange, 2002), Book 2, Section 13.

⁶⁰ The case in question, *Edwards v. Canada* was brought by a group of Canadian women appealing a Supreme Court decision to the Privy Council in the UK. The question at hand was whether women were ‘persons’ who could sit in the Senate. Could the word ‘persons’ in the relevant section of the British North America Act (1867) be read to include women? At home in Canada, the Supreme Court had decided not, reasoning that, in 1867, women were not ‘qualified persons’ to sit in Parliament and therefore could not have been thought ‘qualified persons’ to sit in the Senate. But on appeal, the Privy Council reversed that decision, arguing that there was no reason to interpret the constitution as though it were still 1867. Times had changed and the constitution could grow with the times while maintaining its essential form. “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits,” wrote Lord Sankey, overturning the decision of the lower court.

⁶¹ Sunstein, *A Constitution of Many Minds*, 47.

⁶² Lazar, *States of Emergency*, Chapter 5.

⁶³ Machiavelli, *The Prince and Discourses*, I.34.

⁶⁴ Rossiter, *Constitutional Dictatorship*, 23.

⁶⁵ Examples include the Louisiana Purchase, which, despite opposition, was ratified by the Senate, and Andrew Jackson's suspension of Habeas Corpus in New Orleans in late 1814 / early 1815. Although Jackson was fined, he was also elected President, and years later, his fine money was returned to him amid great applause.